

Exhibit “C”

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SMARTPHONE TECHNOLOGIES, LLC) (
Plaintiff,) (
v.) (Case No. 6:12-cv-245
HUAWEI DEVICES USA, INC.,) (TYLER, TEXAS
et al.) (April 24, 2014
Defendants.) (9:30 a.m.

SMARTPHONE TECHNOLOGIES, LLC) (
Plaintiff,) (
v.) (Case No. 6:12-cv-350
ZTE CORPORATION, et al.,) (TYLER, TEXAS
Defendants.) (April 24, 2014
Defendants.) (9:30 a.m.

MOTIONS HEARING
BEFORE THE HONORABLE JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF: (See sign-in sheet.)

FOR THE DEFENDANTS: (See sign-in sheet.)

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(Proceedings recorded by mechanical stenography,
transcript produced on a CAT system.)

1 THE COURT: Please be seated.

2 All right, Ms. Morris, you may call the
3 case.

4 COURTROOM DEPUTY: The Court calls Case
5 No. 6:12-cv-245, SmartPhone Technologies versus Huawei
6 Devices USA, Inc., et al. as well as 6:12-cv-350,
7 SmartPhone Technologies versus ZTE corporation, et al.

8 THE COURT: Announcements.

9 MR. NELSON: Good morning, Your Honor.
10 Ed Nelson --

11 THE COURT: Good morning.

12 MR. NELSON: -- for plaintiff
13 SmartPhone Technologies, with me is Tony Simon --

14 MR. SIMON: Good morning, Your Honor.

15 MR. NELSON: -- Brannon Latimer, Ben
16 Askew, Tom Cecil, all counsel for SmartPhone
17 Technologies, and we're ready to proceed.

18 THE COURT: All right. Thank you.
19 For the defendants.

20 MR. KANTER: Good morning, Your
21 Honor --

22 THE COURT: Good morning.

23 MR. KANTER: -- Bob Kanter for the
24 defendants, Huawei and Futurewei, with me today is
25 Melissa Smith -- sorry if I cut you off, Melissa --

1 Keith Davis and Lon Outland.

2 THE COURT: Good morning.

3 MR. FINDLAY: Good morning, Your
4 Honor --

5 THE COURT: Good morning.

6 MR. FINDLAY: -- Eric Findlay and Eric
7 Lutz -- Eric Hutz -- excuse me -- here on behalf of
8 ZTE, ready to proceed.

9 MR. HUTZ: Good morning, Your Honor.

10 THE COURT: Morning. Thank you.

11 All right. Well, ready to proceed here
12 with a motion hearing. Before we begin with the
13 motions, which I'll have some comments on the -- the
14 way we'll handle the motions this morning, but is
15 the -- I want to cover the issue of just simply how
16 this case -- these cases are going to be tried.

17 What we have here are two case -- two
18 cases, one against Huawei and Futurewei, another
19 against ZTE. You're both, of course, as you know on
20 the same track headed toward trial, but let me hear
21 from SmartPhone, I guess, first how they intend to try
22 the cases with a couple of defendants -- I don't -- I
23 believe different products.

24 MR. NELSON: Different -- different
25 products at this point, same patents, Your Honor. So,

1 I guess, if both were to be tried, meaning neither one
2 settled prior to trial, then -- then we've got the
3 final pretrial conference I believe on May 20 -- 23rd?
4 24th? -- 22nd, May 22nd, and jury selection's set for
5 the 29th.

6 I mean, I anticipate back-to-back
7 one-week trials. I understand that Judge Davis may
8 not want to go back to back with the -- with the
9 trials, and -- and we'd planned for some flexibility
10 there. I would imagine if we picked the -- picked the
11 jury on -- for both cases on the 29th, then we
12 would -- I think they're set for trial on -- on
13 June 9th, but we'd be amenable to -- to proceeding on
14 the -- on the 2nd, I believe.

15 MR. SIMON: I'm sorry, Your Honor.
16 Just -- it's June 2nd.

17 MR. NELSON: Oh, June 2nd picking the
18 jury. Sorry, my -- my fault. June 2nd is the jury
19 selection. If we selected both juries on June 2nd,
20 we'd be amenable to proceeding with the first trial on
21 the -- on the 3rd, with the -- with the other trial
22 the -- the following week or the week after.

23 THE COURT: Well -- okay. My specific
24 concern is with -- and this may go more to the
25 defendants, but is the defendants' position on the

1 validity issues in the case -- obviously meaning if
2 we're having back-to-back trials as was just stated,
3 what does that mean in relation to the validity
4 issues, the prior art? So, let me hear from Huawei
5 and ZTE on that.

6 MR. DAVIS: Your Honor, Keith Davis for
7 Huawei. The parties, ZTE and Huawei, have different
8 experts, have acted independently with respect to
9 their invalidity defenses, and as a result at present,
10 we haven't coordinated in so far as having necessarily
11 overlapping issues that would necessarily be
12 efficiently tried in a -- a single invalidity trial
13 first. That doesn't mean that there isn't some
14 overlap or efficiency just due to explaining the
15 patents once and certain things like that. But as far
16 as invalidity itself, we do have two different
17 experts, different sets of prior arts, different sets
18 of theories and so on.

19 THE COURT: Okay. Well -- well --
20 okay. Let me hear from ZTE on that.

21 MR. HUTZ: Yes, Your Honor. This is
22 Eric Hutz. Just wanted to indicate that that's
23 consistent with -- with our understanding.

24 THE COURT: Okay. Well, I have dealt,
25 to some extent, with the extent of a -- of the prior

1 art to be presented to a jury in the Huawei case. I
2 guess my question is, does ZTE -- I -- are there
3 issues related to that? In other words, I've got in
4 front of me a number of prior art references for --
5 that I'm allowing Huawei to present as to particular
6 patent, and there's some dispute as to that. I know
7 there's a motion pending on that.

8 But what of ZTE? I have not seen
9 anything on that. Is that --

10 MR. HUTZ: So, what -- Your Honor, what
11 happened was is that the -- SmartPhone and ZTE were
12 able to stipulate to the number of prior art
13 references for each of the patents-in-suit, and we had
14 asked Huawei to do the same. And as Your Honor's
15 aware, there was no agreements, though that was fully
16 briefed and then Your Honor entered his order limiting
17 the prior art.

18 THE COURT: Okay. All right. Well,
19 here's, of course, the thing on this idea of -- of
20 back-to-back trials. What I may want to understand
21 is -- from both defendants is to the extent possible
22 of advising me or informing me of what Judge Davis
23 would potentially sit through for a second time. I
24 know you said there's two experts, and I guess you've
25 compiled your own validity cases and -- and expert

1 reports, but I think he's going to be interested in
2 knowing if he's going to sit through a half dozen
3 references that he just heard the week before. You
4 know, I guess what I'm saying is the extent of the
5 overlap. I think before he sits through two trials on
6 validity, I think he's going to want to know -- want
7 to know what he's hearing -- going to hear twice.

8 MR. DAVIS: I'd be happy to address
9 that, Your Honor. Keith Davis for Huawei.

10 The Huawei defendants have relied
11 principally, although not exclusively, on actual prior
12 art devices in the general plan that I think plaintiff
13 is aware of, as we have witnesses listed on our
14 exhibit list such as Mr. Kanoba, Mr. Hood, so on, who
15 were involved with developing these prior art devices,
16 who may come to trial and testify or whose deposition
17 testimony may be played to explain these actual
18 devices. We may have a few additional written
19 references, so it's a bit of a mix.

20 But, my understanding, and I'm sure
21 Mr. Hutz can address for ZTE, is that our approach in
22 that fashion is not necessarily the approach that ZTE
23 has taken, and as a result, that it would not be that
24 Judge Davis is having deja vu on two back-to-back
25 trials.

1 THE COURT: Okay. Mr. Hutz.

2 MR. HUTZ: Yes, Your Honor. That's my
3 understanding as well, that we're predominantly
4 relying on printed references and the like and not
5 products and things like that, so I do not believe
6 there's a whole lot of overlap between the parties'
7 positions.

8 THE COURT: Okay. All right. Well, I
9 appreciate that. And, you know, as we get closer to
10 trial, Judge Davis may want to visit with you about a
11 number of things and that may be one of them, so he'll
12 be made aware of -- of what you've told me today. But
13 he, again, may want to follow-up with you on exactly
14 what would amount -- or these two trials would consist
15 of, so...

16 Okay. That covers I think what I have
17 as far as trial plan. Anything else the parties want
18 to add on that?

19 MR. NELSON: Not from the plaintiff,
20 Your Honor.

21 THE COURT: Defendants on -- what was
22 put forward here a moment ago was the idea that two
23 juries to be picked on June 2nd, followed up by either
24 a trial straightaway that week or -- right now it's
25 set for June 9th, a trial June 9th, followed up by a

1 trial sometime in the future.

2 Defendants have anything to be -- have
3 anything to say on that?

4 MR. DAVIS: The only thing I'd address,
5 just to put on the record, is one of our fact
6 witnesses is coming off of maternity leave, so she has
7 some scheduling issues about exactly which day. And
8 then our expert, Dr. Wicker, his wife is actually
9 expecting twins at some point in time on or around
10 that date; and if they come early, he would appreciate
11 some certainty as far as exactly when he would need to
12 be here given his personal schedule.

13 THE COURT: Okay. So that's on behalf
14 of Huawei, Dr. Wicker?

15 MR. NELSON: Coincidentally, Your
16 Honor, Mr. Latimer's wife is expecting and is due in
17 June -- June the 8th, and so certainty and an earlier
18 date for purposes of -- of inducing or whatever needs
19 to be done, it would be much appreciated. So I think
20 we've got --

21 THE COURT: Judge Davis is going to
22 have to put out his clairvoyant, When is this going to
23 happen? And he's got a bunch of things to juggle
24 there. I don't know.

25 MR. NELSON: I guess what I'm saying

1 is -- is -- is under the circumstances, it seems on
2 both sides, you know, the greater clarity earlier on
3 about when we're picking juries and when trials are
4 going to start would -- would be much appreciated.

5 THE COURT: All right. So, Mr. Davis,
6 you mentioned Dr. Wicker and there's -- you also have
7 a witness coming off maternity leave?

8 MR. DAVIS: Yes, sir.

9 THE COURT: So you're --

10 MR. DAVIS: And those two witnesses,
11 just for Your Honor's sake, the fact witness' name is
12 Sabrina Bohan, and she's located in San Diego so she
13 will have to travel, and she's trying to make
14 arrangements with her baby and family.

15 Dr. Wicker is actually located in
16 Ithaca, New, York, so it's -- for him, too, it's not
17 exactly an -- an easy trip -- or an easy last-minute
18 logistical arrangements to come down here.

19 THE COURT: Okay. All right. Well,
20 we'll look at that and see about getting you a
21 schedule as soon as possible. Somewhat dependent --
22 you know, Judge Davis I know has at least one other
23 trial set during that time frame. He may have others,
24 but we'll keep that in mind and try to get you
25 something, if possible, as soon as we can.

1 All right. Let's move on to the
2 motions. First of all, let me ask, I believe from my
3 review of the materials, Docket No. 276, one of the
4 motions I believe set for today, I did not find a
5 response to it. I don't know if I missed it.

6 MR. DAVIS: Your Honor, that was the
7 motion on the alter ego defense, and we noted in the
8 pretrial order we dropped that defense --

9 THE COURT: All right.

10 MR. DAVIS: -- so it is moot, I
11 believe.

12 THE COURT: All right. Well, as agreed
13 here, the Court will deny the motion as moot.

14 Okay. So, I'm just going to take the
15 motions, I think, with one exception, just in the
16 order -- their docket entry order. The first motion
17 I'm going to hear is the one on prior art, reducing
18 prior art. My intention would be to allot 20 minutes
19 to that motion, not saying you need to use it all, may
20 not use it all, but I'll allot that.

21 I notice, of course, that there's
22 two -- each defendant has a challenge to Ms. Riley's
23 report, damages report. It's Docket 272 in the Huawei
24 case and 148 in the ZTE case. I think what I'll do is
25 I'll hear both defendants' positions on those -- those

1 reports and then hear from the plaintiff. So
2 allotting 30 minutes for that, and then 15 each for
3 the copying motion, and the -- I guess the ELA
4 agreement motion involving the ACCESS license defense.
5 So 20, 30, 15, and 15.

6 All right. Let's begin with the Docket
7 No. 222 on the motion to enforce the Court's order
8 regarding prior art.

9 MR. NELSON: Your Honor, just a point
10 of clarification, are those total times for the
11 motions and --

12 THE COURT: Total times, yes.

13 MR. NELSON: Yeah. That shouldn't
14 be -- be an issue.

15 Okay. So we're -- we're talking about
16 the motion to enforce the Court's order limiting prior
17 art, and there's a couple of things that are going on
18 here. Essentially, Huawei believes that every
19 anticipation reference comes with a bonus, Your Honor,
20 and that is, additional obviousness allegations.

21 So, if we look at the Model Order
22 focusing patent claims and prior art, it makes very
23 clear that for purposes of the final election of
24 asserted prior art, which we have with respect to
25 Huawei's expert report on invalidity, each obviousness

1 combination counts as a separate prior art reference.

2 And as the Court's well aware, the
3 Local Rules Advisory Committee commentary relative to
4 the Model Order, makes clear that a small number of
5 prior art references can be combined to form an
6 exponentially greater number of bases for invalidity.
7 For the limit on prior art references to be
8 meaningful, each obviousness combination should count
9 as a separate prior art reference. It also says,
10 However by the time of final election, each basis for
11 invalidity should be specifically identified. And I
12 would emphasize specifically.

13 As we discussed at the outset this
14 morning, plaintiff and ZTE achieved a stipulation
15 relative to limits on prior art references. This
16 matter had to be briefed before the Court relative to
17 Huawei. This is a -- an excerpt from the Court's
18 order relative to the limits imposed on Huawei's prior
19 art references for their expert report, and the Court
20 allowed them nine prior art references for the '459
21 patent and six each for the '275 and the '316. The
22 '485 is no longer in the case.

23 So, these are limits on prior art
24 references for their final election of prior art and
25 what goes in their expert report. But this is the --

1 the dime dynamic, I guess, in -- in Huawei's expert
2 report is they used their limits, all with 102
3 references, anticipation references. So there are
4 nine 102 bases -- or nine 102 prior art references
5 relative to the '459 that are enumerated in Huawei's
6 expert report and are discussed in Huawei's export
7 report. Six for the '275 and six for the '316.
8 They're all anticipation. That's the only thing
9 that's discussed.

10 But, taking an excerpt from
11 Dr. Wicker's report relative to the '459, after he has
12 enumerated the 102 bases and discussed them, he has
13 the following passage, which are sort of generalized
14 amorphous obviousness allegations that keep the door
15 open. And I'll point the Court to the -- to the
16 language highlighted in yellow.

17 Moreover, it would have been obvious to
18 one of ordinary skill in the art to combine such
19 functionality disclosed with respect to one or more
20 references or system analyzed in this report with the
21 functionality disclosed with respect to one or more
22 references or systems analyzed in this report to
23 achieve the alleged benefits of the '459.

24 And it goes on to say, A person of
25 ordinary skill in the art would have been motivated to

1 combine any analyzed reference or system with one or
2 more of the other references or systems disclosed in
3 this report.

4 And that's all there is. There is no
5 specificity with respect to any obviousness
6 combination. You could take reference 2, 4, and 6,
7 and say that's -- also renders the '459 obvious, or 1
8 and 9, or 2 and 8, or 3, 4, 5 and 6. There's no
9 specificity here, and it gives us no idea whatsoever
10 what they're going to claim in terms of obviousness.

11 Relative to the '275, for instance,
12 this is sort of a different issue. They -- they come
13 in and they say, In addition to the anticipation of
14 the asserted claims by the -- by the prior art, the
15 asserted claims would also have been obvious based on
16 the scope of the prior art, the differences between
17 the prior art and the claims, and the level of
18 ordinary skill in the art.

19 What does that even mean? I can tell
20 you that what Huawei believes it means is that it has
21 general license to ignore court orders to combine any
22 instrumentality that is a 102 reference in this report
23 with the knowledge of one of skill in the art and say
24 that that's an obviousness position. And, Your Honor,
25 that's not the law. The law requires specific

1 combinations of prior art.

2 Here's the Active Video Networks case
3 that's particularly on point, Federal Circuit 2012.
4 In that case, the expert failed to explain how
5 specific references could be combined, which
6 combinations of elements in specific references would
7 yield a predictable result, or how any specific
8 combination would operate or read on the asserted
9 claims. And the court said that is not sufficient.

10 And then the court went on to say, The
11 opinion by Verizon's expert regarding the motivation
12 to combine references was likewise insufficient. The
13 testimony is generic -- just like Dr. Wicker's
14 report -- and bears no relation to any specific
15 combination in prior art elements -- just like Dr.
16 Wicker's report -- and it fails to explain why a
17 person of ordinary skill in the art would have
18 combined the elements from specific references in the
19 way the claimed invention does. Just like
20 Dr. Wicker's report, there is absolutely no
21 obviousness analysis in the report.

22 So, it's clear what Huawei's done here
23 with these generalized obviousness allegations. They
24 do not bother to enumerate specific combinations of
25 prior art that comprise a 103 or obviousness position,

1 because they know if they did that, Your Honor, then
2 under the Model Order and under Your Honor's order, it
3 would constitute a specific reference, and they would
4 have to use it within their limits. They don't do it.
5 They keep it wide open.

6 So, for the first time at trial, what
7 would happen is if they're not finding success like
8 they want with their anticipation references or don't
9 think that they're -- they're -- from an evidentiary
10 standpoint are able to make the anticipation case,
11 then they're going to have Dr. Wicker start to combine
12 references or combine references with his knowledge at
13 trial, and it's going to be the first time that we
14 learn of a specific obviousness combination and then
15 we're expected to break that down immediately and deal
16 with it. And that's not how this works. You can't
17 simply grab a tactical advantage through
18 non-disclosure, and that's what they're doing with the
19 report.

20 And so the relief we're seeking, Your
21 Honor, is make them stick with their enumerated bases
22 of invalidity, which they choose to -- to go forward
23 with nine anticipation references and arguments for
24 the '459 and six for each of the other two patents,
25 and these -- these amorphous references to -- to

1 obviousness that are -- that are in this that do not
2 specify any obviousness combination, and worse, make
3 no attempt at any sort of analysis relative to
4 obviousness that we can respond to.

5 THE COURT: All right. Thank you.
6 Response.

7 MR. OUTLAND: Thank you, Your Honor.
8 Let me just start by saying that the motion before you
9 is not seeking to strike any part of Dr. Wicker's
10 report. In fact, the plaintiff specifically says that
11 they're not seeking to strike anything. It was just a
12 motion to enforce the court orders.

13 But aside from that, if you look at
14 Dr. Wicker's report, he goes into painstaking detail
15 to establish what the state of the art was at the time
16 these patents were filed. So he has hundreds of pages
17 devoted to -- to establishing through references that
18 were out there, through deposition testimony of fact
19 witnesses, including the inventors which have talked
20 about what the state of the art is when these patents
21 were filed.

22 Dr. Wicker is not planning and Huawei
23 is not planning to have him ambush the plaintiff at
24 trial with any combinations that are not disclosed in
25 his report. What Dr. Wicker will do instead is just

1 to say that the knowledge of a -- of a person of
2 ordinary skill in the art would be this, and to the
3 extent that the -- the patents in this case are
4 dealing with conceptual concepts and items that were
5 ubiquitous in the art, then it's a perfectly
6 legitimate approach to invalidity and obviousness to
7 use single reference obviousness that was approved by
8 the Federal Circuit in SIBIA and in Randall.

9 In fact, in Randall, Your Honor -- I'm
10 sure you've looked at the case we cited in our
11 response -- the Board of Patent Appeals and
12 Interferences looked only at the specific references
13 that were cited and -- and refused to look at the
14 background art that the -- one of the petitioners in
15 the other parties' reexam brought forward. The
16 Federal Circuit said that was error, because you have
17 to look at the background of a person of ordinary
18 skill in the art and the knowledge that person would
19 have based on the state of the art at the time.

20 So, defendants are not planning on
21 having Dr. Wicker testify outside the scope of his
22 report. Every opinion that he -- he plans on giving
23 is in his report. We are not planning on having him
24 ambush the plaintiffs with any specific combinations,
25 but it is certainly legitimate for Dr. Wicker to say,

1 for example, Let's talk for a minute just about
2 specifics like -- let's talk about the '459 patent.

3 The -- Mr. Barr has come back and said
4 that, at least for some -- one or two of the
5 references, that the only thing missing is a
6 selectable page which needs to be in HTML or some
7 markup language. Well, we don't agree that -- that
8 the claims even require a markup language.

9 But aside from that, Dr. Wicker has
10 already set forth in his report numerous times that
11 HTML was well known in the art at the time. So he
12 should be able to testify at trial in rebuttal that
13 even if HTML is a requirement, that was in the art and
14 a person of ordinary skill would recognize it.

15 I want to mention a couple of other
16 things that occurred during the meet and confer on
17 this issue which I think are important. The specific
18 language that they showed you at the end of the '459
19 patent is, I'll admit, inartfully worded, and it does
20 appear that Dr. Wicker might attempt to combine
21 certain references with others.

22 If you look at the way this was worded
23 with -- in the context of the '316 patent, which
24 was -- was cited in our response on page 6 -- actually
25 starting at 5 and going to 6, that is what Dr. Wicker

1 intends to do. And we offered to the plaintiff to
2 withdraw that language and -- and explain that
3 Dr. Wicker was just going to rely on the references
4 that we have cited under 102 as well as -- as well as
5 what Dr. Wicker has established as the knowledge of a
6 person of ordinary skill in the art at the time the
7 patents were filed.

8 Now, those references that we have
9 cited under 102 certainly are part of the knowledge of
10 ordinary skill in the art, but Dr. Wicker is not going
11 to say, for example, I'm going to combine the silent
12 communicator with the Apple Newton. That is not the
13 intent here. We don't believe the Model Order is
14 trying to limit a defendant's invalidity theories.

15 And let me explain it this way. The
16 Model Order says that every obviousness combination
17 counts as a reference, but these are not obviousness
18 combinations. This is a single reference that could
19 be modified based on the knowledge of a person of
20 ordinary skill in the art at the time, just like the
21 Federal Circuit discussed in SIBIA. It's a
22 legitimate invalidity theory.

23 THE COURT: Well, there's nothing that
24 I see that prevents you from doing that, but the --
25 the problem is that you have to have a base of

1 tangible substantive knowledge to talk about
2 obviousness, whether it be some sort of device or a --
3 a publication or a patent or whatever.

4 And there would be nothing that would
5 prevent you from taking reference A and saying it
6 anticipates, and then taking reference A and saying,
7 well, even if it doesn't have something, based on
8 knowledge of skill in the art, you could modify that,
9 here's why you would modify that, here's why you would
10 come up with what is in the particular patent at
11 issue. But that's a reference.

12 So, I don't -- what you're saying
13 substantively I think is acceptable, but it still
14 requires -- and this is why -- what I'm -- I'm
15 somewhat baffled by is how you can think you're going
16 to go through in a one-week trial nine prior art
17 references as to particular patent, anticipating
18 references, going through each element and all of
19 these references and then present some sort of
20 obviousness defense, you know, with -- I'm not quite
21 sure I understand how you're going to do it.

22 So, I think this -- what I need you to
23 respond is to this Model Order statement that each
24 obviousness combination counts as a separate prior art
25 reference. Now I know it says combination, but the

1 point is, is that you can use a reference, but you've
2 got to -- that's a reference, for lack of a better way
3 of putting it, so...

4 MR. OUTLAND: Well, let me say that
5 when we met and conferred on this issue, we actually
6 asked SmartPhone, we said, okay, if we withdrew one of
7 our anticipation references and said that we're going
8 to use the knowledge of a person of ordinary skill in
9 the art combined with whichever references we chose,
10 would that be acceptable. And they said no, it
11 wouldn't solve the problem.

12 So, we actually tried to make an effort
13 to resolve this issue and deal with the issue of --
14 that you're explaining -- that the knowledge of a
15 person of ordinary skill in the art would be a
16 reference. We tried to deal with that, but it wasn't
17 acceptable to SmartPhone, so we ended up here.

18 THE COURT: Well, you know, I don't
19 think it's sufficient, at least based on what I have
20 here, for your expert to say based on knowledge of one
21 of skill in the art, this particular claim is obvious.
22 In other words, he -- he's got to base that on
23 something and point to something. And so that's what
24 I'm trying to get at is, is he's got to point to
25 reference A. It can be a single reference, could be A

1 and B, a combination you put together, but it could be
2 a single one. But he's got to rely on -- on
3 something, not just sort of this amorphous, you know,
4 knowledge of skill in the art.

5 Now -- so what I'm saying is, is that
6 your references that your validity -- invalidity
7 defense is based upon, you've got a total of nine of
8 them and -- and that's it. You know, it sounds like
9 to me -- and these are all anticipatory, then, you
10 know, that's it. I guess I can open the door if
11 there's some sort of agreement that could be reached,
12 but you're limited to nine, and they've got to be
13 firmly based in -- in something.

14 MR. OUTLAND: So you're saying that we
15 have to actually give two references?

16 THE COURT: No. I'm not saying two.
17 It can be one, but you're limited to -- to nine.

18 MR. OUTLAND: And the one could be a
19 knowledge, so you're saying that --

20 THE COURT: Well, I'm not really
21 considering knowledge of -- the whole thing is based
22 on knowledge of skill in the art. I understand
23 obviousness has its particular component where you --
24 you put things together in the art and it would have
25 been known and obvious to one and -- but it's all

1 based on that. Everything the guy is saying is based
2 on that.

3 So, when I get -- when I go to the
4 trouble to say, and this Model Order says, you get a
5 certain number of references, you know, that's got to
6 mean something. Okay? And it's -- it's -- you have a
7 limited amount of time, you've got to explain it to a
8 jury. And just to beat them up -- to death about --
9 they're not going to know what you're talking about at
10 some point. You've got to base it in particular
11 tangible things that the expert can talk about and
12 explain and undergird that with his knowledge of skill
13 in the art.

14 So, I don't know else to say it, but
15 you've got nine references and that's it. So, the
16 motion to enforce the order is granted. You got your
17 nine references and that's it. Okay.

18 MR. OUTLAND: Thank you, Your Honor.

19 THE COURT: All right.

20 All right. Let's move on to the next
21 motion. It's a motion on Ms. Riley's expert report.

22 MR. KANTER: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. KANTER: Bob Kanter for Huawei and
25 Futurewei. I deposed Mrs. Riley a few months ago.

1 She agrees that the plaintiff in this case is only
2 entitled to recover if it prevails on the particular
3 patents with regard to the reasonable royalty for
4 those specific patents. It is not entitled to recover
5 based on patents that are not asserted in the case.

6 At the same time, she told us that the
7 primary basis for her opinion is a set of portfolio
8 licenses that SmartPhone has entered into with, I
9 think, approximately 12 or 13 companies covering
10 literally hundreds of patents and applications. These
11 are global licenses, worldwide licenses covering a
12 plethora of patents.

13 She testified in her deposition -- and
14 our damage figure, by the way, is 2.50. I probably
15 should ask -- they've left, though. I had some client
16 representatives. There was an issue raised with
17 regard to confidential information. They've left the
18 courtroom.

19 Anyway, getting back to Mrs. Riley's
20 deposition testimony, she says it's 2.50 for what are
21 now three patents-in-suit and zero, repeat, zero for
22 all of the other patents in the portfolio licenses on
23 which she bases her opinion. She's made no effort
24 whatsoever to evaluate whether any of those other
25 patents actually have value or not. She's not asked

1 the technical expert for the plaintiff to render any
2 opinion on which she could rely with regard to whether
3 any of those other patents have any value or not.
4 She's not -- she's not asked anybody at SmartPhone to
5 tell her that.

6 Interestingly enough, to show how
7 arbitrary she's being, Your Honor, this case started
8 with eight patents being asserted against us.
9 Literally, when Mrs. Riley rendered her opinions in
10 this case, there were four. One of them's been
11 dropped. So, literally, in the space of a day in
12 which Mrs. Riley dropped -- or -- excuse me --
13 SmartPhone dropped one of the patents-in-suit, that
14 patent went from being worth \$17 million in damages to
15 zero. It moved into the zero column.

16 Another example of the arbitrariness of
17 this opinion is that they've now sued us with respect
18 to other products that are not at issue in this case,
19 asserting not only the patents in this suit but
20 another patent. So what they're telling you in this
21 case is the three patents-in-suit here have \$2.50 per
22 phone value. Everything else is worthless, zero. But
23 we're going to sue Huawei on a patent that we're
24 claiming in this case is worth zero, and I presume
25 they're going to seek damages in that case.

1 Presumably, that patent is going to have some value.

2 The law on this, Your Honor, besides
3 the fact that they can't -- it's black letter law that
4 they cannot recover based on patents that are not in
5 suit. They're proceeding in this fashion. And I'm
6 not saying -- I want to make my position clear -- I'm
7 not saying she -- we're not challenging today the
8 reliance on settlement agreements, and most of these
9 are settlement agreements.

10 What we're saying is, if she's going to
11 use those licenses, she's either got to have some
12 basis, reliable basis, for saying they're worth zero
13 or she's got to make an adjustment. And what
14 plaintiffs typically do, what the courts appear to
15 require, is that they make an adjustment.

16 In our briefs, Your Honor -- I just
17 want to refer to a couple of cases. In our briefs,
18 Your Honor, we referred the Court to a case --
19 relatively recent case out of the District of
20 Delaware, which we all know handles lots of patent
21 cases. And the situation there was very similar.

22 To paraphrase -- and I'm referring to
23 page 3 of -- page 3 of the opinion in AVM, the court
24 says, This is a single patent case. In contrast,
25 three of the four license agreements AVM relies on

1 gave Intel a license to entire patent portfolios that
2 included dozens of licenses -- dozens of patents. No
3 reasonable juror could consider these broad portfolio
4 license agreements to be comparable in scope to a
5 license for only the '547 -- '547 patent, which was in
6 suit.

7 Now, on this particular case, the court
8 decided -- and you'll see it in the final paragraph of
9 the opinion -- that it wanted to hear from the expert
10 first. And in fact, when we checked the docket sheet,
11 the court did have a hearing in which Mr. Evans
12 appeared, and he abandoned his approach of using the
13 portfolio license which the court had questioned in
14 its opinion.

15 This court, Judge Davis, in an opinion
16 they cite in their brief -- and this -- this opinion,
17 Your Honor -- as I say, it's cited in their brief --
18 it's Ericcson, Inc. versus D-Link Systems, decided
19 August 6th, 2013. And again, I just -- I want to go
20 directly to the point. And I'm on page 13 of 22.

21 The five patents in this case are not
22 the entirety of Ericcson's 802.11 portfolio. They are
23 only a subset of it. Mr. Bone's second level of
24 apportionment factors this into account. Mr. Bone
25 reduced his rates to account for the fact that we're

1 only dealing with five patents. This is Judge Davis
2 acknowledging as part of his reasoning for upholding
3 the plaintiff's damage award in this case that they
4 had adjusted the portfolio licenses so that the expert
5 was testifying as to how much of that value went to
6 the patents-in-suit. SmartPhone refuses to do that or
7 is unable to do that.

8 Finally, I received from counsel for
9 SmartPhone yesterday another opinion I want to comment
10 on briefly. It's the -- the Oracle America versus
11 Google case, Your Honor, decided -- this is a Northern
12 District of California case, 2012.

13 In this particular case, a
14 court-appointed expert wanted to -- or provided to the
15 court three bases for the use of portfolios license.
16 It's interesting how his report begins. And again,
17 forgive me for reading, but the words that he used
18 state this better than I could articulate it myself.

19 He begins by saying, Set -- Setting
20 aside what the law may require, my best economic
21 advice is that there are economic reasons, in essence,
22 to use portfolio licenses setting aside what the law
23 may require.

24 That's what they're asking you to do.
25 They're asking you to set aside the black letter law

1 that you can't recover except for what's in the case.

2 In this particular case, he gave three
3 reasons. One, that if the parties knew at the time of
4 the hypothetical negotiation that the IP in suit would
5 have driven the negotiations, the aggregate value of
6 the license in question is attributable to this
7 subset.

8 Second, he said, If the parties did not
9 know what subset of the IP in the portfolio would be
10 most useful, then Google would have licensed an
11 option. The licensee would have -- would have
12 insisted on an option to acquire the other patents.

13 And third, he said they would have
14 taken a license to the whole thing as an insurance
15 policy. Interestingly enough -- and this is the
16 opinion they cite -- the court granted the defendant's
17 motion to strike the first -- excuse me -- the -- two
18 of these. It granted the -- forgive me, Your Honor.
19 I just got this yesterday. They got -- it granted the
20 motion with respect to two. And with regard to the
21 first one, it granted 2 and 3 -- strike 2 and 3.

22 With regard to the first one, it said,
23 It is unclear whether he actually opines that the IP
24 in suit was understood in 2006 to be the most relevant
25 to the 2006 negotiations. If so, he said, The parties

1 haven't adequately briefed the issue. And the motion
2 was denied without prejudice.

3 So, the opinion on which they're
4 relying didn't even definitively decide the issue as
5 they would suggest this court should decide it. And
6 as I say, I think any report that begins with the
7 statement, Setting aside what the law may require,
8 must be viewed with extreme skepticism.

9 When it boils down, Your Honor, what --
10 what their expert is relying upon, what Mrs. Riley is
11 relying upon in this case, is a conversation with a
12 witness, Matt Vella, who owns an interest in Acacia
13 which owns SmartPhone, an interested witness, that
14 gee, the patents-in-suit drive the negotiations.

15 And that's the sole basis for her
16 saying 2.50 for the patents-in-suit, which change from
17 time to time and which may be asserted in another
18 case, and zero for everything else. That's not a
19 reliable basis. It's not what Judge Davis relied upon
20 in the Ericcson case, and it's not what the Delaware
21 court relied upon in AVM. That's point number one.

22 Point number two, Your Honor, boils
23 down to this is an entire market value rule issue.
24 And I know my time is getting a little short. The
25 court issued an opinion in the HTC case. The court

1 said -- and I'll refer specifically to a couple of the
2 statements. We -- I am obviously at a disadvantage of
3 operating with a redacted copy of the order, but some
4 of the -- the specific statements and what I have
5 available to me make it pretty clear what the
6 requirements are.

7 On page 5 of the court's order in HTC,
8 the court said, Moreover, Ms. Riley's income approach
9 looks at the per-unit selling price of the accused
10 products, C, and it cites a report. These methods do
11 not distill the accused devices down to the smallest
12 saleable patent practicing unit.

13 On the following page, Therefore
14 Mrs. Riley's method of, one, using the average monthly
15 operating profit and, two -- and this is the important
16 part -- the per-unit selling price of the accused
17 products improperly invokes the entire market value
18 rule.

19 And let me -- let me add to this. What
20 she did in this case, Your Honor, it's interesting.
21 When they're -- when they're responding to our first
22 point, they want to talk about the real world. When
23 they're responding to the second point, the last thing
24 they want to do is talk about the real word. Because
25 what Mrs. Riley's has done, every one of the licenses

1 on which she relies is a lump-sum payment license.

2 What she's done with arbitrary criteria
3 is convert what the parties agreed to into a per-unit
4 number. She makes no effort whatsoever, however, to
5 attribute the per-unit number to the specific accused
6 technology. And it's particularly important in this
7 case. You know well from the HTC and other cases
8 there are literally hundreds of patents out there that
9 relate to SmartPhones. They have hundreds of patents
10 that allegedly relate to SmartPhones.

11 Mrs. Riley agrees there are patented
12 items in this case and there are lots of unpatented
13 items in this case, but she's made no effort
14 whatsoever to attribute the value to a particular
15 portion or aspects of the accused products. And that
16 is demonstrated by the fact she has a "one size fits
17 all" opinion.

18 In other words, if they prove
19 infringement of one claim under the '316, \$17 million.
20 If they prove infringement of a different -- entirely
21 different claim under a different patent, the '459,
22 \$17 million. '275, \$17 million. If she had done what
23 she's supposed to have done, she would have made an
24 analysis of exactly what is the technology that's at
25 issue with regard to the individual patents, and she

1 has not done that. She has not complied with the
2 entire market value rule.

3 They have no marketing study, no
4 survey. They've made no effort whatsoever to show
5 that these particular features drive demand. None. I
6 don't think that's disputed.

7 Finally -- I know my time is short --
8 we had a third basis; that is, she cites -- but to be
9 candid with the court, she really doesn't rely upon
10 some Huawei licenses. We think that if she is relying
11 on those, that's improper simply because by her own
12 admission, she's made no effort whatsoever to link the
13 technology covered by the other Huawei licenses to the
14 technology in this case.

15 And I think as you well know, a
16 plaintiff must show, when they're relying upon
17 licenses, that there's an economic comparability and a
18 technical comparability. She's done none of that.

19 So, for all of those reasons, Your
20 Honor, we're asking the Court to strike Mrs. Riley's
21 opinions in this case.

22 THE COURT: All right. Thank you.

23 Let me hear from ZTE on their motion.

24 MR. HUTZ: Good morning, Your Honor.

25 Eric Hutz on behalf of ZTE. I think from our

1 perspective -- and I think I really can't add a whole
2 lot to what Mr. Kanter said because I think a lot of
3 the issues, if not all of the issues, that are
4 reflected in Huawei's motion are the same with respect
5 to our motion.

6 I have not seen Ms. Riley's report in
7 the Huawei case, but I would hazard a guess that the
8 two reports are, essentially, identical with a few
9 numbers and a few other things changed. So, we would
10 adopt all of the reasons that Mr. Kanter just elicited
11 as to why the report in both cases should be stricken.

12 There are a few discrete items that I
13 think are unique to our motion, which I'll cover very,
14 very briefly, one being we did raise the issue with
15 respect to the house report. That's something we're
16 content to rest on the papers and does not need to be
17 belabored here at this point.

18 With respect to comparability, we do
19 have one situation that I think does require at least
20 brief discussion and that is with respect to one of
21 the ZTE agreements that Ms. Riley relies on in her
22 report.

23 Now, they say she's not relying on the
24 report to set what she calls a reference range. But
25 the agreement is apparently being used as a check, or

1 as she put it, a reasonableness test to match up or
2 presumably to show that the \$2.50 per-unit rate that
3 she selected in connection with the litigation is
4 somehow reasonable, because at some point ZTE agreed
5 with another party to assert an amount on a per-unit
6 basis and that somehow that shows that her report or
7 her \$2.50 value is reasonable.

8 And she admits in her report that she's
9 not aware of any evidence showing that that agreement
10 is in fact comparable, and reliance -- she is relying
11 on it, at least to the extent she's doing it, to show
12 that this other amount is a legitimate amount.

13 There's no comparability analysis. The two agreements
14 are completely different. And from that standpoint,
15 if that is where she is intending to go with that
16 agreement, then we do not believe that that's proper.

17 And with that, Your Honor, I will turn
18 it over to the plaintiffs.

19 THE COURT: Thank you. Response.

20 MR. SIMON: Good morning, Your Honor.

21 Tony Simon.

22 THE COURT: Good morning.

23 MR. SIMON: It's good to be back in
24 your court. I want to talk a little bit about --
25 first, with respect to both arguments, I'll address at

1 the same time. What the defendants are doing here is
2 they've got the shotgun approach to attack Ms. Riley's
3 report. And while they say they're not challenging
4 her use of the prior settlement licenses, that's
5 exactly what they're doing.

6 We have to start -- or Ms. Riley had to
7 start and the plaintiff in this case had to start from
8 the following starting point; one, we try and use this
9 hypothetical negotiation which presumably occurs, in
10 fantasy, sometime prior to infringement, and we try an
11 use real world activities of each of the negotiators
12 in that hypothetical negotiation to try and
13 hypothesize what those parties would have agreed to
14 had they come to a license on the patent-in-suit.

15 So, on the one hand, we've got
16 SmartPhone as one of those real -- one of the
17 negotiators in this case, because at the time of the
18 hypothetical negotiation, SmartPhone would have been
19 the negotiator, and then we have each of the
20 defendants. So what we're trying to do is replicate
21 as best we can what would have happened in August 2010
22 for Huawei -- and I think it's 2011 for ZTE -- this
23 hypothetical negotiation.

24 Now, it's important to note that the
25 law doesn't say, as the defendants would have us

1 believe, that in every hypothetical negotiation, no
2 matter what the real world facts are, this is what you
3 have to do. In fact, each hypothetical negotiation is
4 analyzed on a case-by-case basis and differs from case
5 to case, because what we're really doing is we're
6 looking at what really happened in real life with
7 these two negotiators and then putting them in this
8 fantasy situation and trying to guess what they would
9 do based on what they actually have done in the past.
10 Now -- so that's the first point. We have to deal
11 with the hypothetical negotiation.

12 The second point is, this Court held --
13 and I'm quoting from your order -- Consequently, the
14 only relevant evidence of a reasonable royalty in this
15 case is the settlement licenses that deal with the
16 patented features. So the only relevant evidence of a
17 reasonable royalty in this case -- now that was the
18 HTC case. And HTC acts as the patent owner, would
19 have been negotiator.

20 Here, it's even more compelling that
21 that's the only relevant evidence, because SmartPhone
22 would be the negotiator in that hypothetical
23 negotiation. So that's the second point of reference
24 we have to start with.

25 So we're going to look at what

1 SmartPhone did in the past in those only relevant
2 settlement licenses and try and determine -- and look
3 at what they actually did and then apply it to this
4 hypothetical negotiation. So, that's exactly what
5 Ms. Riley did.

6 She said, Well, I talked to Mr. Vella,
7 he's the chief negotiator, and I know they have some
8 complaints about, well, he makes -- he makes money
9 from the company because he's employed by the company.
10 That's, of course, cross-examination. The jury will
11 hear from Mr. Vella. They can judge his credibility.
12 They can cross-exam him and Ms. Riley.

13 But he said -- she asked him, What did
14 you look at when you -- when you did those 13
15 licenses? And he said what drove the dollar amounts
16 in those settlements, the lump sum amounts, was the
17 patents in those suits and the accused U.S. sales of
18 the defendant because they were litigation licenses.
19 And that makes sense. That's naturally what does
20 drive litigation settlements. The parties look at
21 their potential exposure, what could I get if I win,
22 discounting it because of litigation uncertainty,
23 those kind of things, so what drove those licenses.

24 Now, they specifically asked him -- and
25 we cite this testimony in our response -- they asked

1 Mr. Vella in his deposition, and Ms. Riley cites this,
2 Did you look at all the other portfolio -- all the
3 other licenses in the ACCESS portfolio, all the other
4 licenses SmartPhone looked at in trying to assess the
5 value, he said no. That's not what we knew about. We
6 knew about there were litigation settlements, we knew
7 about the patents-in-suit, we knew about the accused
8 products, and we were asserting the best patents in
9 the portfolio. So, that's actually happened in real
10 life.

11 So, the other thing Ms. -- Ms. Riley
12 said -- and she said this in her deposition when Mr.
13 Kanter asked her -- she actually testified and said,
14 No, no, no. You're misunderstanding my point. This
15 is on pages 102 and 103 of her deposition. She
16 said -- he asked, Do you think it's realistic that you
17 would just -- Apple would pay \$38 million to settle
18 that case and not look at all the other patents?

19 And she says, I think when you're
20 trying to settle a case, you want coverage for as much
21 as you can get. When you're talking about the numbers
22 that are driving the settlement, it tends to be driven
23 by what the parties know. That makes sense to me.
24 That makes sense to me in negotiating settlement
25 agreements.

1 So the parties say, Apple says I sold
2 122 million units in the U.S. This number fits my
3 understanding of my liability. That's what the
4 parties know the most about. They don't know as much
5 about the patents that aren't in suit. They haven't
6 done the claim charts on those. They haven't mapped
7 them to the accused products. There haven't been all
8 these depositions and reports written by experts.

9 So, in real life, in the 13 settlements
10 that are the only relevant evidence that we have to
11 use, what SmartPhone actually did in those
12 negotiations was said, Hmm, what can I get -- let's
13 focus on the patents-in-suit in those cases and the
14 accused products in the U.S., what's my potential
15 liability, and came to some kind of settlement. So
16 we're still trying to decide what would SmartPhone do
17 in this hypothetical negotiation.

18 There's an impractical part of their
19 argument as well. What they're saying by this in
20 every hypothetical negotiation, you disregard the
21 facts if the parties -- the true negotiators wouldn't
22 have looked at all these other patents. And you have
23 to do a value assessment of all those patents.

24 What that means is -- and Mr. Kanter
25 said it again today -- Ms. Riley would have to look at

1 all those patents, 200 patents. We'd have to hire
2 technical experts for all 200 patents. We'd have to
3 go through an analysis of all of Apple's products,
4 HTC's products, Huawei's products, ZTE's products, not
5 just the products in suit, and try and come up with
6 some value of all these patents, even though it didn't
7 happen in real life, and then try and assess how much
8 each patent is worth. That's not the law, and the
9 reason it's not the law is because you try and
10 replicate in the hypothetical negotiation what
11 happened in real life.

12 So, I will point out one other point.
13 With respect to the ACCESS patents, again, the
14 evidence is undisputed. ACCESS owns some hundred
15 patents that it gave licenses to the defendants in
16 those 13 licenses and didn't get a single penny for
17 it. They got what was called a defensive termination.
18 So, essentially, if Apple or Samsung sues ACCESS
19 later, that license is gone and ACCESS has that to
20 assert -- those hundred patents to assert back. There
21 was no consideration paid for those. That's
22 undisputed. So there certainly doesn't need to be
23 valuation for that.

24 With respect to the other patents, the
25 evidence is undisputed by Mr. Vella that what we did

1 was come up with a number based on the
2 patents-in-suit.

3 So, to recap, we want to look at how
4 the licenses were negotiated to settle litigation,
5 because that's what the focus has to be, and it has to
6 be based on what actually happened in real life, and
7 that's exactly what Ms. Riley did. All of the cases
8 they cite, all of the cases they cite deal with
9 portfolio licenses negotiated at arm's length.

10 And I'll submit I agree that if in
11 those cases -- for example, in this Ericcson case that
12 Mr. Kanter just talked about, in the Ericcson case
13 there were portfolio licenses negotiated at arm's
14 length. And the facts in those cases were that the
15 parties probably did go and try and assess the value
16 of the patents in that portfolio. That's what the
17 patentee probably did back then, Ericcson.

18 That's not a settlement -- litigation
19 settlement analysis. They weren't bound by what we
20 have to do in this case, which is use those actual
21 settlement licenses to see how those agreements were
22 negotiated. In fact, the AVM case that Mr. Kanter
23 points out, in the AVM case there's -- there's a great
24 way to distinguish it and make our point even better.
25 Intel's the defendant.

1 The plaintiff in that case is saying,
2 Intel, you previously settled litigation for different
3 patents, and I want to use those -- those litigation
4 settlements in this case to say what you would have
5 agreed to. And the court says, no, no, no, no, no,
6 you have to show because those aren't the
7 patents-in-suit that Intel -- that those patents are
8 comparable in order to give you some insight as to
9 whether the settlements in those cases tell you what
10 Intel, the defendant, would do in the hypothetical
11 negotiation.

12 That's the opposite here. SmartPhone
13 is the negotiating party. SmartPhone settled those --
14 those 13 prior settlements. SmartPhone did the
15 negotiations. So what we're looking at the 13
16 settlements are, is we don't need to look at the other
17 patents in the portfolio because SmartPhone didn't
18 look at them. We're not saying that Huawei would have
19 done what SmartPhone did in those -- in those previous
20 negotiations. That's telling us what SmartPhone would
21 have wanted in that negotiation.

22 Now, on the other side of the equation,
23 we have what would Huawei and ZTE do. So again, what
24 Ms. Riley did is -- they have 40, 50 licenses -- she
25 looked at arm's length licenses, and she looked at

1 those licenses to determine -- try and determine in
2 this hypothetical negotiation what has Huawei done in
3 the past, what has ZTE done in the past and applied
4 that in this particular case.

5 Now, mindful of your order, she didn't
6 say those licenses are relevant. Those licenses would
7 drive the settlement amount. Instead what she did is
8 she said here are those license, and I'm going to
9 reduce them to a per-unit royalty just to see if the
10 number I came up with, this \$2.50, is within the realm
11 of reason of what Huawei would have agreed to.

12 Obviously, if they've never agreed to a
13 license more than, you know, 25 cents, it's hard to
14 say they would have paid 2.50 here just because
15 previously that's not what they did. So she did go
16 through that analysis of their other licenses.
17 However, that's not what she said were the relevant
18 license and that's not what she tried to do where she
19 tried to equate it here.

20 I want to point out is -- and this is
21 the case we came across late and I wanted -- I filed
22 it yesterday, this Google versus or Oracle case. And
23 I think it's instructive in our situation. In that
24 case, Oracle sues Google, and there's a prior
25 negotiation, not in litigation between Oracle and

1 Google, and the court on its own appoints an expert --
2 this isn't one of the party's experts -- and this
3 independent economic expert appointed by the court
4 comes up and says, You know what, I think if we go
5 back in time when they were negotiating for a
6 portfolio license in 2006, if Google would have known
7 that the only patents that really matter to it are the
8 ones that are in this suit, then the value of that
9 portfolio license would be the value of the
10 patents-in-suit.

11 Now, the court didn't accept that from
12 the hypothetical negotiation standpoint. And in that
13 case it shouldn't because in that 2006 negotiation,
14 there wasn't prior litigation. That wasn't what the
15 facts were in that case. But what the court did say,
16 and the part that didn't get stricken in this Oracle
17 case, is -- is the judge said -- and this is on page 3
18 of the order -- Dr. Curl's first explanation that if
19 Sun and Google understood that the subset of Sun's
20 Java portfolio most relevant to the negotiations was
21 composed of the now in-suit patents, the value of the
22 portfolio is the value of the patents.

23 And that's exactly what happened here
24 in real life, and that part didn't get stricken. So
25 what the court said there was, you know, even if

1 you're negotiating portfolio license, if the only
2 thing that's really relevant to you are a few patents,
3 you could see how even though you get a license of the
4 whole portfolio, the real value is just in those few
5 patents that you really need a license for. And this
6 was come up with by an independent expert in a case,
7 and this was come up with -- and this was approved by
8 the judge in this case, even though the facts didn't
9 make it in that case.

10 Now, in our case, we specifically have
11 SmartPhone saying here's what drove how much money I
12 would take in those 13 other settlements, the
13 patents-in-suit for the same kind of products, for the
14 same kind of features. And that's how Ms. Riley gets
15 value here, and that's how she comes up with the value
16 for the inventions.

17 I want to address quickly the entire
18 market value rule. What's confusing to me is that
19 there's a number of cases, including from this court,
20 that say if you're not basing your revenue -- you're
21 not using as a revenue base the market value of the
22 products, you don't implicate the entire market value
23 rule. He cites your order in our HTC case. That's
24 what Huawei cites. However, in that case, she -- you
25 found she was using the entire market value rule which

1 is why you said, no, you need to use the settlement
2 licenses because they're the most relevant.

3 And that brings me to this lump sum
4 versus per-unit royalty. So, we said at the beginning
5 we're faced with a hypothetical negotiation, so we
6 have to look at real world facts. We've got 13
7 settlement agreements, and we have to use those to
8 come up with a royalty rate in this case. All 13 of
9 those were lump sum, so we have to find a way to make
10 them comparable to the facts in this case.

11 And contrary to what defendants argue
12 in the wordsmith case which is citing Lucent, the
13 Federal Circuit said, Running royalty agreements can
14 be relevant to lump sum damages, but some basis for
15 comparison must exist and the evidence presented to
16 the jury.

17 So that's what she tried to do. She's
18 trying to take these lump some payments that Apple and
19 HTC and all these companies sign and put them in a way
20 that she could fit into the facts of this case so she
21 could make them comparable. And for a practical
22 reason, that was another reason she had to do it,
23 because we're only entitled to damages in this case
24 for the actual units sold by Huawei. At the time of
25 the report, it was X number of units. By the time we

1 get to trial, it will be Y number of units. We have
2 to adjust that accordingly. So we -- so Ms. Riley
3 needed some way to do that comparison.

4 So, sure, there were lump some
5 payments, but they were converted into per-unit
6 royalty just so we could make them comparable in
7 accordance with the Federal Circuit law and make them
8 relevant to what we think would be the damages in this
9 case.

10 And by the way, that's what their
11 expert does, too, Mr. Bakewell. He uses -- you know,
12 he uses market share. Well, what is market share?
13 How many phones they sold in a given time period
14 compared to, you know, the market as a whole. So,
15 where all the experts are trying to use a way to take
16 these other lump sum licenses and come up with a
17 number in this case.

18 The last thing I want to mention, Your
19 Honor, is the use of other licenses. Again, what
20 Ms. Riley is trying to do is take the real world past
21 licenses of ZTE and Huawei and use that to hypothesize
22 what they would have agreed to in a hypothetical
23 negotiation. We got the SmartPhone side. We're
24 trying to get the Huawei side.

25 In the HTC order, the same issue came

1 up, and there was no comparability test of all the
2 other patents. And what you stated was, Despite loose
3 relation to the patented technology, the licenses and
4 cross-licenses of defendant may be relevant to the
5 Georgia-Pacific analysis. And that's how she uses
6 them here. Again, she doesn't say, well, in these 10
7 licenses, you paid a dollar-fifty a phone and that's
8 why the royalty would be a dollar-fifty a phone here.

9 She goes to the Georgia-Pacific
10 factors, which she must, and assesses, well, what are
11 the types of licensing activities by Huawei and ZTE so
12 we can try and hypothesize what would happen in the
13 hypothetical negotiation.

14 Your Honor, unless you have questions,
15 that's all I have.

16 THE COURT: Okay. Mr. Simon, let me
17 ask you a couple of questions. First is this -- on
18 this issue of portfolio licenses. Now, wouldn't it
19 make sense that there would be some account given to
20 the fact that the particular license at issue is to an
21 entire portfolio, an entire array of patents, rather
22 than just to these particular patents-in-suit?

23 You know, to say, at least in part, it
24 may be small, but the fact that a licensee was able to
25 obtain a license to this wide array of patents, it

1 accounts for something. And what I'm understanding
2 from the arguments here that your expert's position is
3 for purposes of what she's going to present to a jury
4 is, is that is zero, that it meant nothing. And
5 wouldn't it make sense that it meant something?

6 I find that hard to wrap my mind around
7 that you've got parties A and B, and party B is taking
8 a license, even in litigation, and the -- but the fact
9 that they're getting more than, say, the three
10 patents-in-suit, it sort of diffuses what is
11 attributable to those particular patents. I
12 understand those are the patents in litigation.

13 But when you're trying to hone in on
14 what those particular patents are worth, wouldn't it
15 make sense to say there's some reduction in that value
16 of those patents because the license -- the licensee
17 got all this other stuff?

18 MR. SIMON: Well, first, I would say
19 Ms. Riley didn't testify that they're worth zero.
20 Okay. What she said was the monetary aspect of those
21 license, the money given, was calculated based simply
22 on the patents-in-suit. So when your order says the
23 most relevant licenses are those, we need to determine
24 what would the money be. We're looking at the money;
25 we look at the patents-in-suit.

1 Second is I disagree that no matter
2 what the other patents are about, there's some value
3 there. Certainly, there's a little bit of value in
4 that the parties want peace and won't be sued. But
5 give an example, let's assume you have in the -- in
6 the HTC settlement a hundred patents that relate to
7 making ice cream, and HTC doesn't make ice cream, and
8 at the end of the negotiation when they -- we decide
9 on the amount of money, we say, Oh, by the way, we
10 want to license all your patents, we don't want to be
11 in court with you ever again, is getting a license to
12 a bunch of patents that cover ice cream -- making ice
13 cream --

14 THE COURT: But that's not really what
15 we have here. We've got a -- a plaintiff, your
16 client, that, as I understand it, holds a patent --
17 has a -- holds a portfolio full of -- for lack of a
18 better way of describing it -- SmartPhone patents.

19 So, I understand this is a litigation
20 license, but if you're going back to a hypothetical
21 negotiation, while I agree that to some extent the --
22 the more substantial weight when talking about the
23 negotiation is probably going to center around the
24 patents-in-suit. But if you're talking about a
25 hypothetical negotiation, the fact that you're getting

1 other SmartPhone patents, I just -- it's hard for me
2 to see how that -- it's not ice cream patents. It's
3 SmartPhone patents.

4 MR. SIMON: I agree. I was trying to
5 make an analogy because my next step was going to be
6 this, that's not the facts in this case. They're not
7 ice cream patents. But the facts in this case are
8 true that SmartPhone didn't ever in any of those
9 negotiations, based on the testimony, of those
10 litigation settlements, say, by the way, I've got
11 these other patents so pay me a little more. And the
12 other side never said --

13 THE COURT: Well, now -- now let me
14 stop you there. Their position is, is that you have a
15 particular patent you assert, and you say it's, you
16 know, generated \$17 million in damages, and then when
17 it drops out, it's worth nothing.

18 Now, what -- you know, what's your
19 position on that, number one; and number two, what
20 would you say if they're allowed to ask that -- as to
21 why a patent's worth \$17 million and now it's zero --
22 to your expert at trial?

23 MR. SIMON: Well, in the hypothetical
24 negotiations, it's presumed infringed and valid.
25 That's not the case at trial. Okay. So if it's

1 proved invalid, it is worth nothing. But the -- but
2 the fact of the matter is, again, we're looking at a
3 hypothetical negotiation between SmartPhone who
4 negotiated these licenses.

5 So we look at what they did, and what
6 they did previously is they said whether you infringe
7 one patent or five patents, here's what we want for a
8 license. And they use it in their damages' assessment
9 in those litigation matters, and then they ended up,
10 after they agreed on a number, granted a license to
11 the other patents and -- and gave zero additional
12 consideration for it in those terms.

13 So we're faced with, What do we do
14 here? Logically, you would assume that one would pay
15 something more for all these other patents, especially
16 if they have to with SmartPhones. But what do we do?
17 Do we ignore the facts in real life, which is the
18 whole basis of RescueNet? It said let's look at what
19 really happened in this case. If a plaintiff really
20 licensed these, even in litigation for X, that's
21 relevant. So we can't make up facts. We can't change
22 the facts.

23 So, is the next step we've got to go
24 through and do a valuation assessment of all these
25 patents? I mean, that will cost millions of dollars

1 of expert time, because I guarantee you if Ms. Riley
2 said, Well, I equate 10 percent of those prior
3 settlements to the rest of the portfolio, they would
4 be in here saying, Strike that. What do you -- what
5 do you base that on? Did you hire experts? You're
6 not a technical person. How did you get that?

7 That's not what was agreed on these
8 negotiations. It's contrary to the facts. So what
9 we're stuck with is, we have to use these settlement
10 licenses, we know how the dollar amounts were
11 calculated, we know that there really wasn't
12 consideration paid, so we've got to come up with new
13 consideration and -- and say, well, some of that was
14 for that even though the parties in that negotiation
15 didn't do it.

16 I mean, we'd have to hire experts on
17 all those patents. And not just on the patents, we'd
18 have to go to Apple and say, What other products did
19 you have that might have been implicated by all these
20 other hundred patents? And what other patent --
21 products that maybe Apple knew about that were going
22 to come out that they might have assigned a value to.

23 I'm not quite sure how there's a
24 practical way to do that without running afoul of all
25 the other bases that an expert has to have. I mean,

1 truly, you know, to the extent he's saying this is
2 arbitrary, I think in reading all these cases
3 preparing for this hearing, the waters in patent
4 damages are very murky, and we're all trying to deal
5 with that.

6 But -- but -- but there's no question
7 that we have to use a hypothetical fantasy
8 negotiation, and we have to use these prior litigation
9 settlements, and then what do we plug into that
10 analysis otherwise without spending millions of
11 dollars on expert witnesses.

12 THE COURT: Okay. Well, let me ask you
13 another question. This entire market value issue,
14 isn't the problem similar to what I talked about in my
15 prior opinion that Ms. Riley is taking the entire
16 unit, she's saying, Okay. Well, I'm not going to go
17 on, you know, the revenue generated by the -- the
18 phone. I'm going to go by the per unit.

19 Is she still not drilling down to what
20 the -- it seems to me what she's doing is she's
21 saying, well, they settled these cases on these
22 patents for this much, this defendant sold this many
23 units, so divide that out, and that's 2.50 a unit.
24 She's still taking the unit as a whole and not
25 figuring out what is it -- what is it worth, these

1 patented features. What is it worth, what are they
2 worth, not what the phone as a whole that -- again, as
3 I said in my prior opinion -- has many features to it,
4 but what are the patented features worth. Is it
5 another way of just saying, I'm not going to take the
6 cost of the phone? I'm going to take the phone as a
7 whole, as a unit, as a tangible unit? Isn't that the
8 same thing?

9 MR. SIMON: Well, no, it's not, for a
10 couple of reasons. First, she has to get the value of
11 the invention. And what she said in her
12 depositions -- her depositions, she -- in both of
13 them, she said, The damages I calculated are
14 attributable to the invention because they're based on
15 licenses for the patents-in-suit to other SmartPhone
16 manufacturers.

17 So if the basis of the amounts paid was
18 Apple's being sued about these patents-in-suit among
19 others, and HTC's being sued on these patents, so what
20 did these competitors, what did they value these
21 inventions. Okay. So she's not taking the unit as a
22 whole. So, she's got a lump sum number, and the point
23 is, how does she make that lump sum number comparable
24 to what Huawei and ZTE are doing in a way that she can
25 apply it to the -- only the accused products in

1 this -- in this case.

2 Now, we -- we have sued them in another
3 case, same three patents, an additional patent that
4 was in reexam, but for different products. Okay. So
5 we've got to apply to the units sold in this case.
6 How do you apply that to the units in this case,
7 because this hypothetical negotiation tells us a
8 number, but it doesn't really get them a license.
9 It's as if they would have gotten a license, what they
10 would have paid for it.

11 So I'm not sure that I've answered your
12 question, so I'm going to go -- I'm going to go back
13 to it, and -- and this is what I would say. In the
14 HTC case, there was this cost approach, this loss
15 opportunity cost.

16 And she said, I'm going to take the
17 revenue that you would have made and the profits you
18 would have made, and it would have taken you so many
19 months to recover that, and so I'm going to reduce
20 that using the total revenue you lost.

21 And I think that's where she may have
22 run afoul or where you -- I understood you found she
23 ran afoul of the entire market value rule. But, what
24 difference does it make -- I mean, how do you
25 implicate that entire market value rule when she's not

1 talking about the value of the product? What she did
2 is she took the value of what the other defendants
3 paid to settle litigation for the patents-in-suit and
4 she tried to put that in a per-unit amount based on
5 Apple and HTC and the number of phones they sold and
6 where they are in the marketplace.

7 And there was a case cited by -- by the
8 parties by Judge Davis and -- and where he -- it was
9 a -- it was a motion to compel discovery about the
10 negotiation, and what he pointed out was in that
11 particular case, there were defendants who had bigger
12 market share that settled for less and other -- so
13 maybe it wasn't really the value of the patents here.

14 THE COURT: Well, let me -- let me ask
15 you this. The -- if you look at the Court's prior
16 opinion, it says at the top of the -- of page 8, The
17 only relevant evidence of a reasonable royalty in this
18 case -- and this was this particular case, HTC -- is
19 the settlement licenses that deal with the patented
20 features.

21 Now, in these licenses you're talking
22 about, is there discussion of the fact, well -- I
23 don't know, I guess one of the licensees is Apple?

24 MR. SIMON: Correct.

25 THE COURT: Okay. So if Apple -- does

1 it say Apple has sold 40 million phones and we're
2 going to pay you this many dollars, so that comes out
3 to, you know, per unit. So I think what you have to
4 take is, is that, for example, this licensee is
5 licensing this on the patented features. Okay. Maybe
6 that's what they felt they were worth.

7 But, to translate that over to another
8 defendant on a pure per-unit basis is concerning to
9 me. You know, Apple may have felt or HTC may have
10 felt a way about these things, but how does this
11 defendant feel about them, or at least some, you know,
12 basis to opine about how they would negotiate on this
13 basis for the patented feature, so...

14 MR. SIMON: It's a predicament we're
15 in, Your Honor. I mean, I agree with you, it's a
16 predicament. We're being told that we have to use the
17 amount Apple paid and the amount SmartPhone took in
18 the Apple negotiation as one of the relevant licenses.
19 Now we've got to translate this to the hypothetical
20 negotiation. Certainly that translates to what
21 SmartPhone would take. And we look at -- we look at
22 the -- she looked at in order to -- in order to
23 translate to a per-unit number.

24 She asked Mr. Vella, When you were
25 accepting these numbers, what -- what was the horizon?

1 Did you look at ten years? Five years? And he said
2 about two years because that's the life of a
3 SmartPhone.

4 And you can look at RIM and Blackberry
5 and where they are now. HTC had a 30 percent market
6 share and within a few years went to a 5 percent
7 market share, so he said two years was reasonable.

8 But we do have to translate that. Now
9 we have to also translate it to what would Huawei
10 take. Are these patents of the same value as -- as --
11 to Huawei or ZTE as they are to Apple and HTC? I
12 don't know. We can look at Huawei's other licenses,
13 which is what she tries to do and they complain about
14 that. We -- you know, I'm not sure if Huawei would
15 think of the same thing as Apple would.

16 But once we're forced to use litigation
17 settlements, how are we supposed to determine that?
18 That's the predicament we're in. So we're doing our
19 best to try and deal with this hypothetical
20 negotiation, which we must, and these prior settlement
21 agreements, which we must, which were lump sum
22 licenses. And even if we were to say a lump sum,
23 we're just going to pick a lump sum out of thin air?

24 We have to have some way to -- to say,
25 well, compared to Apple, Huawei is this; compared to

1 Apple and HTC, ZTE is this. We have to have some way
2 to compare. So using product volume, market share,
3 that's -- that's what we're using.

4 THE COURT: All right. Thank you.

5 All right. I'm going to take a break
6 here for -- take 10-minute break and then resume back
7 here with '273, the motion on copying, and then we'll
8 finish up with the motion on the -- the counterclaim.
9 So, in recess for about ten minutes.

10 (Break.)

11 THE COURT: Please be seated.

12 MR. SIMON: Your Honor, may I make one
13 point? First, at the break there was a question about
14 whether I misrepresented something. I want to make
15 sure it's clear. What I said was Michele Riley did
16 not say those patents are worth zero. What she said
17 was, I accepted as true what happened in those
18 negotiations where they told me they didn't assign any
19 consideration to them. So I just want to correct
20 that.

21 The other thing I'd point out is, on
22 the break, I was thinking about your question, and
23 the -- the company that's in the best position to say
24 those patents are worth a different amount to Apple
25 and -- than they are to ZTE and Huawei, they're ZTE

1 and Huawei, and they have every opportunity to do that
2 at trial.

3 THE COURT: All right. Thank you.

4 All right. Let's move to the '273.

5 MR. NELSON: Your Honor?

6 THE COURT: Yes.

7 MR. NELSON: That's -- that's obviously
8 Huawei's motion, but argument on this may be mooted by
9 Your Honor's ruling on the -- the motion at the outset
10 on the -- on the obviousness references, because they
11 only have anticipation references, and this motion
12 deals with rebuttal evidence from our validity expert,
13 secondary considerations, and particularly copying.
14 And if there isn't going to be presentation of
15 obviousness positions because it's not in the expert
16 report of Dr. Wicker, then --

17 THE COURT: Okay.

18 MR. NELSON: -- then our expert has no
19 need to present that evidence.

20 THE COURT: Response.

21 MR. DAVIS: Let me just -- I guess what
22 I need to know from the plaintiff still is, aside from
23 the issue of obviousness, is this question about
24 copying of Google going to come up in any other
25 context in the trial.

1 THE COURT: Okay. Is it going to come
2 up in any other context in the trial?

3 MR. SIMON: Your Honor -- this is Tony
4 Simon -- potentially rebuttal. If -- you know,
5 there's some things in their expert damages report
6 that talks about why ACCESS failed and Palm failed and
7 so the patents had little value because those
8 companies failed; and part of that relates to, well,
9 if Google took all their employees away, that's why we
10 failed.

11 THE COURT: Okay.

12 MR. NELSON: Just in rebuttal to that,
13 if they're going to make that argument.

14 MR. DAVIS: I guess what I would say,
15 Your Honor, is if you will indulge me five minutes to
16 just explain the issues so it's on the record --

17 THE COURT: All right.

18 MR. DAVIS: -- and if it comes up at
19 trial in some context, then --

20 THE COURT: Okay. Go ahead.

21 MR. SIMON: And we wouldn't -- that
22 wouldn't be presented with the invalidity expert,
23 obviously.

24 THE COURT: Okay. All right.
25 Go ahead.

1 MR. DAVIS: Well, the point I want to
2 make is simply this, in -- in whatever context whether
3 obviousness or otherwise, it -- it seems that what the
4 plaintiff may present in this case is an assertion
5 that the allegedly infringing invention as allegedly
6 found in the Android operating system came from Palm
7 and from these employees that -- that plaintiff just
8 mentioned having left Palm to go to Google.

9 So, the relevant issue here is simply
10 has any analysis been done in the case by anyone. And
11 it came up -- particularly in the context of Mr. Barr,
12 their invalidity expert -- about whether they have
13 actually proven any sort of theft or copying of the
14 invention and whether this -- this story between
15 employees leaving Palm to go to Google has any
16 relevance to this case at all.

17 And the points here are very
18 straightforward. It's not as involved as the last
19 argument about Ms. Riley. For them to prove that that
20 story has any relevance, the issue would be have they
21 shown that Google copied the invention or took the
22 invention from Palm, and there has not been any
23 analysis in the case on that.

24 I just point to Exhibits E and C in our
25 response that I believe are the Barr deposition

1 transcript and the Hoffman deposition transcript.
2 They speak for themselves as far as the lack of
3 analysis. At most what they attempt to say is say
4 that certain concepts or features were borrowed
5 from -- from Google -- from Palm for Google, and
6 that's not enough to be, you know, relevant in this
7 case for -- for that type of evidence to be
8 admissible.

9 And so I don't want to pre-but a lot of
10 other context in which this -- this might come up, but
11 I just want to -- I want to raise that point with --
12 with the Court and the fact that -- it's obviously
13 Patent Law 101 -- that for them to prove that there's
14 some relevance here as far as taking the invention or
15 copying, they would have to do an analysis comparing
16 the claims to what was taken.

17 To the extent that they're saying,
18 well, the reason the invention failed is some other
19 reason just because employees from Palm left Google,
20 well, I assume that the -- the premise still is that
21 Palm allegedly had the invention, and that's not an
22 allegation that's supported in this case.

23 They have never shown that Palm or any
24 of the employees at Palm or Mr. Hoffman actually had
25 what is the '316 patent invention. To do that, they

1 would have to do the entire analysis. And I think
2 that the Federal Circuit analysis as far as what you
3 have to show as far as copying of the invention for
4 non-obviousness and secondary indicia would be equally
5 applicable and persuasive as far as any allegation of
6 copying of the invention in any other context, damages
7 or whatever they might raise. And that would include
8 copying of a specific product as required by the
9 Federal Circuit and -- and so on and so forth.

10 The only other thing I'd point out to
11 Your Honor -- and I'll sit down because I know that
12 we've had a lot of argument already today -- is that
13 in paragraph 460 -- excuse me. Let me just reference
14 real quick, Your Honor.

15 In paragraph 467 of -- of Mr. Barr's
16 report, which is kind of the context in which all this
17 has arisen, that's his kind of an ultimate conclusion
18 where he says, As a result, many of the key
19 Corsica/Rome framework features, which is this -- this
20 Palm development development -- developed at
21 PalmSource, including -- and they list a bunch of
22 items -- were copied by Ms. Hackborn's Google team
23 largely composed of former PalmSource and ACCESS
24 Systems American -- ACCESS Systems America employees
25 who worked under Mr. Hoffman as they designed and

1 built Android. As sort forth in Dr. Green's
2 infringement report, Android's use of these features
3 infringes the asserted claims of the '316 patent. In
4 other words, infringing features of the Android
5 operating system used in Huawei's products were copied
6 directly from PalmSource, later ACCESS Systems
7 America.

8 So my point is, what their expert has
9 said in this case so far, whether in the context of
10 obviousness or otherwise, is simply that certain
11 features were copied from Palm to Google, not that the
12 invention was copied from Palm to Google.

13 And one final point on this is, is
14 this -- Mr. Simon indicated, this did indeed come up
15 in the context of rebuttal to invalidity. There's
16 going to be in limine issue as far as the fact that we
17 haven't had the opportunity and never had the
18 opportunity to depose Google or get Ms. Hackborn's
19 side of the story, and so on and so forth, because Ms.
20 Hackborn wasn't identified in the initial disclosures
21 of plaintiff. Google wasn't identified. This theory
22 didn't come out during discovery.

23 So that's one of the things they
24 critique Huawei on in their responses, saying, well,
25 Huawei doesn't disagree with all the facts about what

1 happened. We never had an opportunity to do any
2 investigation of that given when this came out at
3 the -- the point in the case. So again, that's
4 something for another day to resolve, but I just
5 wanted to put that on the record as an additional
6 factor as far as this line of argument and however it
7 may come up at trial or otherwise.

8 THE COURT: All right. Thank you.

9 MR. DAVIS: Thank you, Your Honor.

10 THE COURT: All right. Response.

11 MR. LATIMER: Brannon Latimer for
12 plaintiff SmartPhone. Just a couple of points very
13 briefly. I feel like our opposition brief made our
14 points fairly clearly, and I don't want to regurgitate
15 everything for the Court here.

16 But, first of all, you know, Huawei
17 spends a lot of time saying that -- that Mr. Barr
18 didn't form any analysis, and that's simply incorrect.
19 His -- his deposition testimony and his report made
20 clear that he considered lots of evidence, including
21 Mr. Hoffman's testimony, Mr. Schlesinger's testimony,
22 Dr. Green's expert report.

23 He brought his own expertise and source
24 code level of knowledge of Android to bear on all
25 this. And he looked at PalmSource technical

1 documentation -- documentation and he saw -- he looked
2 at public admissions from current Google employees
3 acknowledging that they did work at PalmSource for
4 Mr. Hoffman and attributing the specific infringing
5 components of Android to Mr. Hoffman and PalmSource.
6 That's all part of his analysis, and the snippets that
7 you find in Huawei's briefing making it sound like
8 Mr. Barr didn't do any of that is -- is irreconcilable
9 with the broader picture of his testimony and his
10 report. So, that's the first point.

11 The -- I guess the way to -- all this
12 evidence -- there was a point made by Mr. Davis about
13 whether specific features are the invention, and I
14 guess I'm a little unclear perhaps on what the point
15 he's trying to make is, but Mr. Barr's analysis is
16 that the invention is embodied in those specific
17 features of Android, activities and intents, and the
18 package manager and activity manager. And those
19 things work together. They are an embodiment of the
20 invention.

21 Those specific features are exactly
22 what are described in the technical documents, and
23 they are exactly what Mr. Hoffman explains that he
24 invented at PalmSource. So there's a direct
25 evidentiary -- evidentiary link between the embodiment

1 of the invention in Huawei's products and their
2 genesis as -- at PalmSource. That's -- that's that
3 point.

4 And then just one more point, Your
5 Honor. I think ultimately Huawei's conclusions, once
6 you get -- their arguments, once you get past the
7 rhetoric, their argument is really that they critique
8 Mr. Barr for not studying a copy of the Corsica/Rome
9 product to do an infringement analysis and confirm
10 that it looks just like Android. And while that would
11 be optimal, that's not -- that wasn't available to
12 him.

13 But that doesn't mean that he can't
14 fairly conclude that the invention was copied, because
15 he -- a reasonable person can conclude that something
16 was copied even without a copy of the original. They
17 can talk to the people who made the original, they can
18 look at other evidence describing the original, and
19 they can compare that evidence with what they see in
20 the replicated version, and they can look at public
21 admissions by the person who did the copying and see
22 that copying did occur.

23 So unless Your Honor has any other
24 questions, that's -- that's all I have.

25 THE COURT: So, to the extent that the

1 issue is, is Mr. Barr from a technical standpoint
2 saying that the invention itself would -- what he
3 considers to be the invention was copied by or brought
4 over to Google who then copied it as part of, I guess,
5 the Android system, you would say that it is
6 technically based. It is based in an engineering or a
7 scientific -- there's an engineering or scientific
8 grounding in it.

9 MR. LATIMER: I don't think a lay
10 person could possibly evaluate the evidence that he
11 did and -- and come to the conclusion he did because
12 it's a technical question. We're talking -- we're
13 talking about a thing called activities and intents
14 and these other attendant functions that are discussed
15 in Dr. Green's report to embody the invention.

16 That -- those are specific, unique
17 features of Android. They're terms of art. And --
18 and it's not -- it's important to understand, I guess,
19 the role they play in the overall operating system.
20 These are the engine that the application model uses
21 to pass information from one component to another.
22 It's not some remote functionality.

23 And if you Google those phrases, you're
24 going to -- what's going to come up is Android.
25 They're terms of art that are uniquely associated with

1 Android, and he appreciates all that as an expert.
2 And so when he speaks of Mr. Hoffman, when he reviews
3 those documents, when he takes in all this information
4 and evaluates it, he brings all that to bear in
5 interpreting, okay, this -- this isn't just a widget
6 that we see here -- and he says he invented a
7 widget -- this is a really unique feature of this
8 operating system.

9 And there's compelling evidence tracing
10 it directly back to this origination point. Even
11 though he doesn't have the -- the original product to
12 inspect and confirm, all the evidence is consistent
13 and show that link. So yes -- yes, it's based on his
14 technical knowledge.

15 THE COURT: Okay. Mr. Davis, let me
16 ask you here as we wrap up this motion. You know, you
17 always ask these questions and it's sort of, you know,
18 puts counsel in opposing counsel's shoes, I guess, or
19 opposing expert's shoes, but, I mean, what is it that
20 you think is missing here from -- I know you disagree
21 with it, but that in this expert's opinion, this --
22 this particular -- it appears to be a copying of this
23 particular imagine. And what is it scientifically
24 or -- or from a technical standpoint that would need
25 to be done? Now I think they admit they don't have

1 the actual components, I guess, and -- and -- you
2 know, but they -- they think they have enough based on
3 the facts, and then the expert looking at them and
4 coming to a conclusion.

5 What is it that's missing from your
6 perspective?

7 MR. DAVIS: Well, two things, and one
8 is it's not necessarily a technical issue so far as a
9 legal issue. I mean, there's -- there's both in play
10 here. But legally -- it's obviously patent 101 -- to
11 prove what the invention is you would have to take the
12 claims as construed by Your Honor and compare them to
13 whatever this evidence is that Mr. Latimer's referring
14 to. And we are certainly not saying that they had to
15 only have source code, they couldn't also talk to
16 Mr. Hoffman, they couldn't also have done other
17 investigations and other evidence.

18 But, it's well accepted that the
19 scientific analysis of an expert would be to take that
20 body of information and then to apply expert analysis
21 that would be in the report to -- to reach a
22 conclusion that our expert, Dr. Wicker, could rebut
23 that would say here's this evidence, here's how I've
24 shown that the first limitation of the claim is
25 satisfied. Here's this evidence. Here's how I can

1 show the second limitation.

2 And so I would suspect the reason that
3 hasn't been done here is not simply because this is a
4 fairly old product and there may not be all this
5 necessary evidence to do so. It also is because they
6 can't actually prove that this is the invention as
7 Your Honor has construed the claims.

8 And the claims for the '316 patent in
9 particular require many different things. It requires
10 multiple protocol handlers, it requires multiple
11 content handlers, it requires a specific shell that
12 does certain things, and so on and so forth.

13 So, if -- we -- we don't disagree that
14 the expert is applying technical expertise in so far
15 as he can obviously understand Mr. Barr, these
16 documents, more than a lay person. That's without
17 question he could. He understands it better than me
18 or probably anybody else in this room.

19 The question is, has he done a
20 scientific analysis, the type of thing that Daubert
21 demands to reach the end point, that being the
22 conclusion that the invention was copying and met all
23 the legal prerequisites to show that as a matter of
24 law. That, Mr. Barr, is without a doubt not done.

25 And not only that, but that is where

1 the Federal Circuit has said there are very specific
2 things you have to do in order to show copying. There
3 has to be an actual real product, he would have to
4 actually show what the features of those products are,
5 he would actually have to compare the claims, and at
6 the end of the day, he would have to show that --
7 that -- that the claims meet the product and that
8 those features then went over to Google and exactly
9 how that occurred. None of that is here.

10 So that's one of our major complaints,
11 is if you read Mr. Barr's report -- and this is again
12 born out by Exhibits C and E that actually are the
13 deposition testimony of the witnesses -- it's more or
14 less an I trust them, I -- I talked to Mr. Hoffman, I
15 found some stuff that corroborates that Google may
16 have borrowed certain concepts, therefore because I'm
17 an expert, copying occurred.

18 Well, that's not proper or complete
19 reliable expert analysis. And there's nothing for
20 our witness, Dr. Wicker, can do then to rebut that
21 because there's nothing where he can say, well, I just
22 disagree. I look at the same stuff and my credibility
23 assessment of all this evidence is no copying
24 occurred. There's nothing -- there's no target for
25 him to shoot at here.

1 THE COURT: Okay. All right. Thank
2 you.

3 All right. Let's move on to the last
4 motion, 275.

5 MR. ASKEW: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. ASKEW: Ben Askew on behalf of
8 plaintiff SmartPhone. Huawei's counterclaim 15 is for
9 enforcement of rights as a third-party beneficiary of
10 the exclusive license agreement between SmartPhone and
11 ACCESS Co. Ltd. Section 11.3 of the ELA is
12 dispositive of this issue. Section 11.3 expressly
13 states the contracting parties' intent to have no
14 third-party beneficiaries. The parties went above and
15 beyond to be clear and explicit about their intent.

16 Section 11.3 states, Nothing in this
17 agreement, whether expressed or implied, shall be
18 construed to give any person a right, remedy, or claim
19 as a third-party beneficiary. Huawei's -- Huawei
20 wants the Court to do just that. Huawei wants the
21 Court to construe the agreement in a way opposite to
22 the -- a clear intent of the parties. A contract must
23 be interpreted to give effect to the intention of the
24 parties at the time of contracting. And to create a
25 third-party beneficiary, the parties' intent must be

1 evident in the contract.

2 And California law requires that that
3 intent is to be determined, if possible, solely from
4 the language of the contract. And 11.3 -- Section
5 11.3 unambiguously states the parties' intent. So
6 Huawei's left with relying on Section 2.1 of the ELA,
7 which they -- they twist the language of Section 2.1
8 and make various arguments under Section 2.1.

9 But, Judge Guilford in the Central
10 District of California was presented with those same
11 arguments on a motion to dismiss where Huawei's
12 allegations are deemed true to the extent they're not
13 belied by the exclusive license agreement.

14 And Judge Guilford on page 10 -- this
15 is Exhibit 7 to SmartPhone's motion, page 10 -- Judge
16 Giulford states, Although such contractual protection
17 against enforcement actions would likely be considered
18 a benefit by ACCESS' customers, the mere existence of
19 a benefit to a third party does not make that third
20 party an intended beneficiary. The issue is whether
21 the parties intended to benefit the third-party, and
22 the terms of the contract make that intent evident.

23 Then Judge Guilford goes on to state,
24 The language of the exclusive license agreement
25 clearly expresses the contracting parties' intention

1 that the ELA not create any third-party beneficiaries.
2 Therefore the court found that Huawei failed to state
3 a claim.

4 And, essentially, Huawei's argument
5 requires this court to ignore Section 11.3 and the
6 evidence of the parties' intent at the time of
7 contracting and rewrite Section 2.1.

8 THE COURT: Well, what this boils down
9 to is -- and just tell me your position on this -- is
10 they say, well, notwithstanding that, we're a customer
11 of ACCESS and you can't pursue us because you're
12 standing in the shoes of ACCESS. And so in that
13 sense, we are third-party beneficiary -- well, that
14 may be the wrong phrase -- but we're just simply
15 precluded from suit precluding -- you're precluded
16 from pursuing us because we're a customer of ACCESS.

17 MR. ASKEW: Right. And -- and assuming
18 for the sake of argument that Huawei is a customer --
19 I mean, Huawei's Chinese parent company, according to
20 deposition testimony, purchased an unspecified web
21 browser from an ACCESS entity. To the extent that
22 makes the defendants a customer under their
23 interpretation of Section 2.1, that still does not
24 confer third-party beneficiary rights on all ACCESS
25 customers. So, the third-party beneficiary status has

1 to be expressly stated in the contract.

2 The contract, it states the exact
3 opposite and applies to all provisions in the
4 contract. And ACCESS -- there's no support in the
5 briefs. There's been lots of briefs in three
6 different courts on this issue. Huawei cannot cite to
7 any authority that an entity that purchase --
8 purchases any product or service from a company
9 therefore obtains an express license or any
10 third-party beneficiary argument regardless of whether
11 that product practices any patent-in-suit.

12 So, the patents-in-suit in this case
13 and -- and SmartPhone's infringement contentions in
14 this case have nothing to do with my ACCESS product or
15 service. So Huawei has not put forth any evidence to
16 state which web browser was apparently purchased,
17 but -- and there's certainly no evidence that that web
18 browser is -- is covered by any patent-in-suit or
19 substantially similar to any -- to any claimed
20 invention.

21 But -- there's just no support for an
22 argument that ACCESS -- or that Huawei automatically
23 becomes an express licensee to the entire SmartPhone
24 portfolio just because a -- a Huawei entity purchased
25 any product from ACCESS. There's just no support, and

1 it's contrary to the plain reading of Section 2.1.
2 And regardless, Section 2.1 cannot be enforced by
3 Huawei because they're not an intended third-party
4 beneficiary.

5 THE COURT: Okay. All right. Anything
6 else?

7 MR. ASKEW: Not at this time, Your
8 Honor.

9 THE COURT: All right. Response.

10 MR. DAVIS: I get double duty today,
11 Your Honor, unfortunately. Or fortunately.

12 All right. Your Honor did hit the nail
13 on the head with your initial question, which is
14 really, if you boil down to it, Are we immune to suit
15 because we're a customer of ACCESS. And the answer to
16 that is yes.

17 As a starting point, I don't think that
18 there's any question that there is at least a genuine
19 issue of material of fact. In fact, we think it's
20 plain that Huawei is an ACCESS customer. We cite
21 Mr. Narasaki's testimony and we cite testimony from
22 Huawei's corporate 30(b)(6) witness, we've attached
23 documents demonstrating that we purchased NetFront
24 browsers from ACCESS, and so that question I think is
25 off the table. Or for the purposes of summary

1 judgment, Your Honor, we believe you have to assume
2 that we are an ACCESS customer, reviewing the evidence
3 most favorably to us as the summary judgment standard
4 requires.

5 So, this question of the interplay of
6 Section 11.3 and 2.1 -- I guess the most direct way to
7 get at this is a couple of ways. Their -- their
8 theory that Huawei, even if it is a licensee or immune
9 to suit, can't assert that because of Section 11.3,
10 would violate a couple of legal tenets. The first one
11 is SmartPhone has to be the party with all substantial
12 rights in the patent to have standing to sue, and your
13 Honor's already addressed that issue in the case.

14 What they're really saying is they're
15 saying, look, there's two worlds. There's the world
16 in which we sue an ACCESS customer and ACCESS decides
17 to step in and stop it, and there's another world
18 where ACCESS sues another one of our customers and
19 ACCESS decides not to stop it. And Huawei, you are
20 helpless, because even though under the undisputed
21 facts you're a customer, you can't control your own
22 fate. Our fate is still in the hands of ACCESS.

23 Well, at that point ACCESS is a
24 license -- or has the power to grant a license because
25 depending on if ACCESS steps to the plate and defends

1 Huawei in litigation, then ACCESS can either
2 effectively grant us a license or enforce the
3 provision of 2.1 or it can't. That doesn't make any
4 sense.

5 We also have black letter law that says
6 you can't contract around patent license as an
7 exhaustion. So, I don't think anyone would seriously
8 argue that in all of the various patent licensing
9 agreements, settlement agreements and so on in the
10 world where it's very standard to put these disclaimer
11 of third-party rights clauses, then nonetheless
12 licensees can enforce those on their own behalf.

13 And that's really what the Federal
14 Circuit was getting at on the appeal in the California
15 case when it pointed out the fact that, look, this
16 Section 11.3 third-party beneficiary issue, it's not
17 an all or nothing issue. It's not that it applies
18 across the board to every provision or not. And that
19 Huawei in enforcing this isn't just doing it for the
20 heck of it of its own right, but it's doing it because
21 under Section 2.1, it's been given a specific benefit.
22 And under the applicable law, Huawei has to be allowed
23 to enforce that benefit.

24 And that's actually consistent with the
25 applicable California law which says you look at the

1 agreement as a whole, you look at the interplay
2 between all the various provisions. You determine how
3 to give effect to all those provisions under their
4 plain and ordinary reading; and in doing so, if you
5 have a more specific benefit that trumps a more
6 general clause, and we're going to give that effect.
7 And that's exactly what's happening here.

8 Section 2.1 -- and it does specifically
9 name, by the way, Huawei because we are a customer.
10 And Section 2.1 says you cannot sue indirect or direct
11 customers or inducers. So it's expressly in there.
12 That -- that clause which was written by SmartPhone in
13 Acacia, which are clearly very sophisticated licensing
14 entities who deal with patents all the time, if they
15 didn't want this to say that, all they would have
16 needed to do is stop at basically the first sentence.

17 And all they would have had to do is
18 say we agree that ACCESS' NetFront browsers, any
19 ACCESS product or service is licensed under all of our
20 patents, period, stop, done. And they know that as a
21 matter of law, it -- automatically taking on the force
22 of law, that is all that any customer would be
23 entitled to as a license.

24 And not only that, but they would also
25 know that they need not even mention a customer is a

1 beneficiary in the clause, and instead they did the
2 opposite. They expressly put in their -- they
3 expressly put in the agreement in Section 2.1 you
4 cannot sue direct or indirect customers or end users,
5 and that was very deliberate on their part.

6 Another related point is, is it's
7 entirely plausible -- excuse me -- entirely plausible
8 to believe that the point of Section 2.1 in the
9 additional language in the agreement is because ACCESS
10 does not want SmartPhone to cause problems with its
11 customers which may upset other commercial or business
12 relationships that come back to bite ACCESS.

13 That's an entirely plausible reason to
14 have more protection than just simply you can't
15 infringe -- you can't accuse our customers of
16 infringing our patents, but you can go after our
17 customers for anything else. Because, of course, we
18 find out these are ACCESS' patents. We might get mad
19 at ACCESS, we might, you know, do other things in
20 response, you know, Huawei being upset with the fact
21 that it's getting sued as ACCESS customer.

22 And again, Mr. Narasaki's testimony
23 bears that out when he talks -- certainly he does say,
24 you know, you shouldn't go sue our customers on our
25 patents. But even more broadly, he says in the first

1 part of his answer, The fact of the matter is we -- we
2 don't want our customers getting sued, or at least
3 that's a plausible interpretation. It's enough for
4 there to be a fact question for the jury on exactly
5 what does Section 2.1 mean and does it have this
6 broader meaning or not.

7 THE COURT: Well, you mentioned for the
8 jury. So, would it be your position that -- what
9 would the jury be asked on this point?

10 MR. DAVIS: They could be asked, for
11 example, a special interrogatory on what was the --
12 based on the totality of the evidence, what was the
13 import of Mr. Narasaki's testimony about does -- does
14 ACCESS want its customers sued.

15 THE COURT: Okay.

16 MR. DAVIS: And that would be a fact
17 question. That would be a credibility question based
18 on the record and all the other evidence. And, of
19 course, that would ultimately go to the Court, and the
20 Court would have to take that into account with, you
21 know, ultimately construing the contract as a matter
22 of law. But, factual disputes about the credibility
23 of witnesses and evidence and so on and so forth,
24 that's still to be resolved by the jury, genuine
25 material factual disputes.

1 THE COURT: Okay.

2 MR. DAVIS: It -- I'm sorry, Your
3 Honor.

4 THE COURT: Did you have some more on
5 that?

6 MR. DAVIS: No, no.

7 THE COURT: Okay. On this point
8 about -- it's raised that what's at issue here is this
9 web browser. Now, there's some discussion about,
10 well, what effect does that have, you know? It's -- I
11 guess my question is, was the extent of the customer
12 relationship discussed in the agreement, the ELA? You
13 know, in other words, you're a customer for web
14 browsing but they're suing you on particular patents
15 that had nothing to do with web browsing, you know.
16 I'll just throw that out there.

17 But -- and they also say, you know, you
18 need to prove that this has no reasonable
19 non-infringing use and -- I mean, what's the
20 relationship between what you're a customer for with
21 ACCESS and what we're talking about here. They seem
22 to be bothered by the fact that even if you are a
23 customer, that doesn't give you the right to practice
24 patented -- patents that they own for any use for all
25 time. It just gives you carte blanche in their

1 opinion to just in -- infringe with impunity because
2 you purchased a web browser at some point, you know,
3 many years ago.

4 MR. DAVIS: A few points on that.
5 First is if that was their intent, they could have
6 clearly written that in, again, by stopping at the
7 first sentence of Section 2.1. Your products are
8 licensed all the way down the supply chain. End of
9 story. At that point, no dispute that they could
10 never sue Huawei, ACCESS -- or -- excuse me -- Huawei
11 or any other customer or person who ends up with one
12 of these browsers. Okay. They added the additional
13 language.

14 Second point is, again, these were
15 sophisticated parties and they have amended this
16 agreement a number of times. So I think it's very
17 plain that SmartPhone knows exactly what business
18 ACCESS is in. SmartPhone knows exactly that ACCESS'
19 primary product is this NetFront web browser, and that
20 when they included that in connection with language,
21 what they were saying was we at least understand that
22 patents that are connected to web browsers might be
23 implicated by this clause, and so at least those
24 patents have to be covered here. It can't just be
25 that, you know, that in connection with -- you know,

1 it does have some force and effect. It's in the --
2 it's in the agreement, so we do think they knew about
3 that.

4 Now, they do try and make their whole
5 argument turn on the fact of, well, we didn't, you
6 know, sue here on infringement of the ACCESS web
7 browser, but there's still a connection there. And --
8 and our position still turns out to be fundamentally
9 that under the first clause of the independent clause
10 of the third sentence of Section 2.1 that they cannot
11 pursue licensing of Huawei as a direct or indirect
12 ACCESS customer.

13 So giving force and effect of that
14 clause, despite the additional second dependent clause
15 and the -- the common -- the additional language is
16 what they rely on, that first independent clause is
17 good enough here, that first independent clause that
18 says you cannot pursue licensing of a direct or
19 indirect ACCESS customer. And we are clearly that.

20 And it's interesting because there is
21 some interplay here between the Riley issues that they
22 discussed earlier today on damages just in this sense.
23 They've essentially said that, well, really all these
24 litigations, even though we're only asserting a few
25 patents, ultimately the end game here is a portfolio

1 license. You're going to, at the end of the day, have
2 to take a bunch of our patents, even stuff that we
3 don't think you practice or we haven't told you
4 exactly about.

5 So, SmartPhone's pursuit of licensing
6 its patents as a whole is a different activity than
7 the specific enforcement action of only certain of
8 those patents that it chooses for litigation purposes.
9 So that's why we think that giving that first clause
10 force and effect where it says you cannot pursue
11 licensing of a -- of an ACCESS direct or indirect
12 customer -- and we're clearly that as Huawei --
13 that -- that that's the end of the story.

14 But if there does have to be this
15 connection, as Your Honor points out, with the web
16 browser, we've pointed out in our briefing there is
17 connection to the patents that are on a web browser.
18 There's no dispute about that. And again, if you look
19 at the evidence in our favor on the summary judgment
20 standard, you would have to find there's at least some
21 connectivity between the asserted patents here and
22 the -- the NetFront browser by ACCESS.

23 THE COURT: Okay. All right. Let me
24 hear back from SmartPhone for a moment. What's the
25 point of 2.1?

1 MR. ASKEW: Section 2.1 is a grant back
2 license to ACCESS. The -- the beneficiary of that
3 provision is ACCESS. There's no intent in Section 2.1
4 to give an express license to any customer of any
5 ACCESS entity that buys any particular product is now
6 licensed to -- to practice all SmartPhone patents in
7 any future product. And that reading is -- that
8 reading is -- is absurd.

9 And Section 2.1 speaks for itself. The
10 clause that they're -- that they're most concerned
11 with is the third sentence that says, SmartPhone shall
12 not pursue the licensing of the patents with ACCESS'
13 direct or indirect customers and end users, and will
14 not institute enforcement actions against such
15 customers of ACCESS and end users, comma, in
16 connection with ACCESS' products or services.

17 This lawsuit is not in connection with
18 ACCESS' products or services. They don't even know
19 what web browsers -- there's no evidence of what web
20 browser they -- they purchased, apparently one version
21 of a NetFront web browser. But even if they did know
22 what product or -- or service they purchased from
23 ACCESS, it's undisputed that no ACCESS products or
24 service is incorporated or used in any accused product
25 in this case.

1 SmartPhone's infringement contentions
2 have nothing to do with an ACCESS product or service.
3 This case is not in connection with an ACCESS product
4 or service. That's the plain reading of Section 2.1.
5 And regardless, getting back to the -- to the initial
6 point, defendants cannot enforce Section 2.1 because
7 Section 11.3 expressly states the parties' intent.

8 And in the Central District of
9 California, Judge Guilford assumed the customer
10 allegations to be true. So all this dispute over the
11 customer allegations, he is -- those allegations were
12 assumed to be true and still stated that Huawei could
13 not state a claim for third-party beneficiary status.

14 And I'll just make one more point on
15 that particular issue, because their sur-reply made
16 new arguments and attached new exhibits. There's
17 three agreements that purport to further expound on
18 this customer allegation that even if it was assumed
19 true is -- is irrelevant. But one's a statement of
20 work. There's no evidence that statement of work was
21 ever implemented from 2005.

22 One is a document that is an unsigned,
23 undated -- they're saying it's an agreement, but
24 there's no signature date. And it says in that
25 agreement, I believe, that -- that any -- to the

1 extent it was ever executed, which there's no evidence
2 of that, that the rights given to Huawei in that
3 agreement only go to the Huawei Chinese parent
4 company. It can't go to any of its subsidiaries.

5 So, and then the third argument -- the
6 third agreement is a document in Chinese that they
7 have not produced a translated copy, yet they tell
8 Your Honor they want to submit it at trial to the jury
9 even though there's no fact question for the -- for
10 the jury here.

11 So, I think the -- the plain reading of
12 Section 2.1 goes against Huawei's interpretation.
13 It's a baseless interpretation. It's commercially
14 unreasonable. Regardless, Section 11.3 expressly
15 states the parties' intent. That is why many courts
16 in California, including in the Pegasus case, reject
17 arguments such as Huawei's.

18 In Pegasus, the court said, there's no
19 authority to get rid of an express third-party
20 beneficiaries clause. There's no authority to support
21 this argument. So the parties stated their intent,
22 that intent must be respected, and there's no
23 authority to throw out such an express provision.
24 Balsam, Pegasus, Trustees of the Screen Actors Guild,
25 GECCMC, multiple cases rejecting these types of

1 arguments. The reason why parties put in a provision
2 like Section 11.3, that nothing should be construed to
3 provide any third-party beneficiary rights is to avoid
4 arguments such as this. They knew what they intended.
5 It's expressly stated in the contract that nothing
6 should be construed to -- to go against their express
7 intention.

8 THE COURT: Okay. All right. Thank
9 you.

10 All right. I'm going to wrap up here.
11 Anything further from the plaintiff?

12 MR. NELSON: I don't think we have
13 anything further, Your Honor.

14 THE COURT: All right. Anything
15 further from the defendants?

16 MR. KANTER: No, sir, for Huawei.

17 MR. HUTZ: No, sir.

18 THE COURT: All right. Thank you for
19 your arguments. We'll get you rulings on these as
20 soon as we can. We're adjourned.

21 (Hearing adjourned.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a
true and correct transcript from the stenographic
notes of the proceedings in the above-entitled matter
to the best of my ability.

June 1, 2014

JILL E. McFADDEN, CSR
Deputy Official Reporter
State of Texas No.: 3392
Expiration Date: 12/31/14